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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals is reported at 292 F. 2d 794. Otherwise, the statements in the petition as to the opinions below and the jurisdictional requirements are correct.

STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth in the petition, Sections 1(4), 3(4) and 202(c)(2) of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. §§ 1(4), 3(4) and 302(c) (2)) are pertinent. These statutory provisions are set forth in the appendix to this brief.

QUESTIONS PRESENTED FOR REVIEW

1.

(a) Whether the Chicago railroads are prohibited by the Sherman Act from entering into an exclusive contract with an agent of their own choosing for the interchange of passengers and baggage between railroad stations in Chicago.

(b) If not, whether their selection of such an agent was nevertheless a violation of the Sherman Act if it was attended by inducements and motives which were improper or unlawful for reasons extraneous to that Act or its purposes.

2.

Whether these questions were properly presented for determination and review by

(a) a detailed complaint in which plaintiff specifically alleged the ultimate facts on which its claim of antitrust violation was based, and

(b) evidence and offers of proof submitted by plaintiff for the expressed purpose of establishing those ultimate facts.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The question of whether the trial court erred in ordering a separate trial (over the objection of both sides) of the issue of "public injury" (cf. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656, 660 (1961)), dealt with in detail in petitioner's Statement of Facts (pp. 7-8), is not an issue here. The majority and the minority in the Court of Appeals agreed that this was error (the majority so stated in the related case of *United States* v. *McConnell*, No. 13175 in that court, which is not yet reported), and proceeded to consider the alternative ground stated by the trial court in its judgment order (A. 1754-55), *viz.*, the legal sufficiency of plaintiff's claim under the Sherman Act. This was proper because the court was required to sustain the judgment on any ground supported by the record (*Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957)).

Both the majority and the minority recognized that the question of the applicability of the Sherman Act was properly before the Court of Appeals. The ultimate facts petitioner claimed constituted a violation of the Sherman Act appear from the detailed factual allegations of its complaint, as well as from its offers of proof, which, contrary to petitioner's repeated erroneous assertion otherwise, were made for the sole purpose of showing a Sherman Act violation. This is demonstrated below at Point II, pp. 19-22.

PETITIONER'S CLAIM FOR RELIEF

The claim on the merits may be concisely stated as follows:

Petitioner, Parmelee Transportation Company, and its predecessors in interest had been the exclusive interstation transfer agent for the railroads in Chicago for many years.[1]

In 1954, the railroads, concerned about rising costs of the service[2] and predictions by Parmelee that costs were likely to go still higher,[3] appointed a committee comprised of the six respondent railroads "to make a study of the transfer situation, including various types of operation that can be devised to definitely meet the needs of the

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[1] Def. Ex. 30, A.A. 192-206 at 197-98, A. 1558; Pl. Ex. 107, Ex. A. 388, A. 1227; A. 281. See also *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228 (1947). The transfer arrangements were made with the railroads as a group. Def. Ex. 5, 9-13, 15-9, A.A. 72-106, 115-63, A. 1194-95; A.A. 3-4, 5-6; A. 1511; Ex. A. 388; and see *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 78-79 (1958), to which Parmelee and the corporate respondents were parties.

The printed appendices below have been filed by petitioner pursuant to Rule 21(3). In this brief the abbreviation, "A." refers to petitioner's Appendix, "Ex. A." to its Exhibit Appendix, and "A.A." to respondent's Additional Appendix.

[2] The rate per coupon was increased, in response to demands from Parmelee, from 85¢ (A. 1140-42) to $1.00 in 1948 (A. 1143); to $1.05 in 1952 (A. 1146-47); and (by an agreement made in April, 1954) to $1.12½ beginning January 1, 1954, to $1.20 beginning April 1, 1954, and to $1.22 beginning July 1, 1954 (A. 1154-55).

The railroads absorbed the cost of the service, the passenger receiving a transfer coupon as a part of his through ticket without extra charge (A. 275) (except in the insignificant number of cases in which his journey was shorter than 82 miles on each side of Chicago, A. 1123-25).

[3] The 1954 demand was for $1.25. (A. 1148; A.A. 132-39, 14-15, 7-8.) It was accompanied by representations that Parmelee was losing money (A. 898, A.A. 39), that it needed $1.32 to $1.35 per coupon to break even (A. 1147, 1152-53; A.A. 8-9), and that the charge might soon go to $1.50 (A. 1152, 1399; A.A. 39, 36). Parmelee persisted in refusing to furnish profit-and-loss data or to allow the railroads to examine its books for support for its representations of losses. (A. 1283; A.A. 38-39, 4-5, 6-7, 15.)

public without increasing the cost to the railroads." (A. 1389.) (These six railroads paid over 68 per cent of the total transfer cost. Pl. Ex. 23, Ex. A. 51, A. 674-75.) The committee contacted some twelve transportation firms considered large enough to handle the transfer service (A. 1159; A.A. 42; Ex. A. 18), one of whom was respondent Keeshin.

In response to the committee's solicitation, Keeshin submitted a proposal providing for a lower initial rate than Parmelee was then charging[4] and for certain improvements in the service.[5] In view of the capital outlay required to enter the business, a five-year term was proposed. (Ex. A. 346.) A few months later, in March 1955, Parmelee submitted its proposal for a six and one-half year contract, in which it offered to reduce its initial rate to match Keeshin's offer but did not offer to match the improvements in service proposed by Keeshin.[6]

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[4] The rate offered was $1.20 per coupon for the first year (as compared with the $1.22 Parmelee was then charging) and $1.22 and $1.23 for the second and third years respectively. The rates for the fourth and fifth years were geared to employees' wages. (Pl. Ex. 97, 98, Ex. A. 346, 356, A. 1086-87.)

[5] Including all new equipment, replacement of passenger equipment every thirty months, air conditioning of passenger equipment and two-way radio dispatching. (Ex. A. 343-44.) Keeshin, in contrast to Parmelee, also offered to open his books and records to the railroads. (A. 1292.)

[6] Pl. Ex. 95, Ex. A. 336-39, A. 1086. In its proposal petitioner also sought a 1¢ per coupon increase for each 1% decrease in the number of passengers transferred. (Ex. A. 338.) Although this was unacceptable to the railroads (A. 1166), petitioner persisted in it until two months later (A. 1178-79), when it at last receded and, shortly thereafter, offered to match the second and third-year rates Keeshin had offered and to place a ceiling on the rates for subsequent years (Pl. Ex. 96, Ex. A. 340, A. 1086). It should also be noted that Keeshin had a three-year contract with his labor (Pl. Ex. 98, Ex. A. 356, A. 1087), while Parmelee's labor contract was about to expire; and that a strike (such as had occurred in 1950, A. 1138, 908) and picketing of railroad stations were threatened (A. 1413-17).

The foregoing facts are not subject to dispute. The subsequent events are in dispute, but we assume here, as did the courts below, that petitioner's version of these events is true.

Petitioner contends that, after the events described above, Keeshin brought about his selection by inducing Hugh W. Cross (then a member of the Interstate Commerce Commission) to intercede with the six railroads on his behalf; and that Keeshin improperly influenced Cross to do so, and Cross, to induce those railroads to act favorably to Keeshin, promised them favors in matters pending before the Interstate Commerce Commission. (Appendix to Petition, pp. 7a-16a; A. 1745-46.)

The substantive question of law in this case is whether, this conduct (assuming for present purposes that it occurred) violated the Sherman Act, which is the sole basis for the action. No relief is sought under any other statute or common law principle.

ARGUMENT

I.

The Conduct Charged Does Not Constitute A Violation Of The Antitrust Laws

The decision of the Court of Appeals is not in conflict with any decision of this Court. The Court correctly decided the narrow issue of whether the Sherman Act applies.

A.

THE EXCLUSIVE CONTRACT BETWEEN THE RAILROADS AND THE TRANSFER AGENT IS LAWFUL

The decision of the Court of Appeals is not, as petitioner asserts (Petition, pp. 9, 16), in conflict with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). On the contrary, the *Yellow Cab* case, read with the other pertinent decisions of this Court discussed in B, below (pp. 15-18), required the Court of Appeals to hold the Sherman Act inapplicable.

In the *Yellow Cab* case, this Court expressly recognized that this same Chicago transfer arrangement, when Parmelee rather than Keeshin was the exclusive agent,[7] was not unlawful.

What the Court held unlawful in the *Yellow Cab* case (pp. 228-29) was the conspiracy between Parmelee and its cab company affiliates to prevent any potential bidder other than Parmelee from bidding for the transfer contract.[8] But the Court made it clear that it was not con-

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[7] The exclusive arrangement Parmelee and its predecessors had with the railroads for many years is identical in all pertinent respects with the contract between respondent Railroad Transfer and the railroads. (A. 1743; see footnote 1.) Parmelee's proposal (the rejection of which is the basis for this action) sought a six and one-half year continuance of this exclusive arrangement. (Ex. A. 388, 337.)

[8] This holding and its inapplicability in the case at bar are discussed under B, below, at pp. 12-13.

demning the long-standing practice of the railroads of making an exclusive contract with a single agent to perform the transfer service. The Court, after noting (p. 228) that "Parmelee's contracts are exclusive in nature," stated (p. 229):

> "It is true, of course, that the exclusive contracts for the transportation service in question are not illegal. *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279."[9]

The *Yellow Cab* case stands squarely for the principle that, as stated in the cited *Donovan* case, railroads have the absolute right and discretion to select an exclusive agent for performance of a railroad transportation service such as interstation transfer, and that consequently the antitrust laws are not violated when that right is exercised. Therefore, the railroads could have selected an exclusive agent to render the transfer service without seeking competitive bids. They are not answerable to disappointed bidders. Their responsibility is to supply an adequate service to the public.[10]

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[9] On remand, this ruling was followed by the district court, *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936, 944 (N.D. Ill. 1948), whose judgment was affirmed by this Court, 338 U.S. 338 (1949).

[10] Other decisions in accord with the *Yellow Cab* and *Donovan* rulings are *Delaware L. & W. R.R.* v. *Morristown*, 276 U.S. 182, 189 (1928); *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U.S. 518, 528-29 (1928); *Depot C. & B. Co.* v. *Kansas City Terminal R.R. Co.*, 190 F. 2d 212, 214 (W.D. Mo. 1911). See also *Friend* v. *Lee*, 221 F. 2d 96, 100, n. 5 (D.C. Cir. 1955); Anno. 15 A.L.R. 56 (1951); and see *Chicago, St. L. & N. O. R.R. Co.* v. *Pullman Southern Car Co.*, 139 U.S. 79 (1891). The right of the railroads to enter into a joint arrangement for railroad terminal facilities such as the interstation transfer service is also recognized in *United States* v. *St. Louis Terminal*, 224 U.S. 383, 402, 410 (1912); *Transfer In St. Louis and East St. Louis By Dray and Truck*, 155 I.C.C. 129, 143-44 (1929); see also *Central Transfer Co.* v. *Terminal Railroad Ass'n*, 61 F. 2d 546, 550 (8th Cir. 1932) (affirmed, 228 U.S. 469 (1933)).

The Yellow Cab Ruling That The Exclusive Contract is Lawful is Reinforced by the Interstate Commerce Act.

The necessity that the railroads make the kind of arrangements they had with Parmelee and later with Keeshin's company was recently explained by this Court in *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 78-79 (1958) (the Parmelee ordinance case).[11] There, it will be recalled, the Court held invalid the Chicago city ordinance (which had resulted from a communication by Parmelee to city officials) excluding any transfer company other than Parmelee from using the city streets for transfer purposes. The Court said:

> "Chicago is one of the Nation's great rail centers. Each day thousands of railroad passengers travel through that City on continuous journeys from one State to another. Since the lines of all railroads which carry passengers into and out of Chicago come to an end in one of that City's eight terminals, through passengers frequently arrive at a station different from the one where they are to board their outgoing train and must transfer with their baggage in order to continue their trip. Because of the serious problems of scheduling and passenger convenience involved in this interchange, the railroads, as a group, have long provided for the transfer of through passengers from one station to another by a systematic and highly organized motor carrier operation. Generally the passengers receive a coupon covering this transfer service, without special charge, as part of their through ticket.
>
> "For many years the railroads had an arrangement with Parmelee Transportation Company under which

[11] Petitioner Parmelee and the corporate respondents were all parties in that case.

> it carried through passengers between stations. Apparently finding its service no longer desirable, the railroads notified Parmelee in June 1955 that they would discontinue using its transfer vehicles as of October 1, 1955. Subsequently they engaged Railroad Transfer Service, a corporation specially organized at their request for that purpose, as their exclusive transfer agent for a five-year period commencing with the termination of Parmelee's service." (357 U.S. at 78-79.)

Turning to the question of whether the transfer service is covered by the Interstate Commerce Act, the Court stated that Sections 1(4) and 3(4) of the Act (49 U.S.C., §§ 1(4), 3(4)) "not only authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines but impose an affirmative obligation on them in this respect." The Court added that the transfer service "is at least authorized, if not actually required under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines."[12] The Court also referred to Section 202(c)(2) of the Act (49 U.S.C. § 302(c)(2)) as providing "that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or contractor of its choosing, shall be regarded as railroad transportation. . . . " The Court concluded:

> "We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities." (357 U.S. at 87.)

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[12] Whether the service is required (see Petition, p. 16, footnote) is immaterial, since it is "at least authorized" and thus covered by the Act.

While the Interstate Commerce Act allows the railroads in certain circumstances to perform services covered by the Act through an agent or contractor (as here, under Section 202(c)(2)), it looks solely to the railroads for adequate performance of the service and their obligations under the Act. From this sole responsibility of the carriers arises the rule that they have an unqualified right to select the contractor.[13] It was on this principle that the decision in the Parmelee ordinance case rested. The Court said (357 U.S. at 88):

> "Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents. For example, the railroads here undoubtedly have a better understanding of how to handle the transportation problems involved in expeditiously moving thousands of passengers from station to station each day than do local officials. Because of close time schedules, the great volume of traffic and its irregular ebb and flow, the railroads obviously need a cooperative and dependable transfer operator with suitable equipment who is willing to work in close harmony with them. The railroads have rejected as unsuitable the only transfer service now licensed to operate by the City. If local officials can prevent them from providing this service by some other means a breakdown in the organized transfer of passengers could result. At a minimum they would be forced to deal once again with the rejected operator."

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[13] A long line of Interstate Commerce Commission decisions applies this principle. *E.g., Worcester Excursion Car Co.* v. *Pennsylvania R.R. Co.*, 3 I.C.C. 577, 590 (1890); *Transfer In St. Louis and East St. Louis by Dray and Truck*, 155 I.C.C. 129, 141 (1929); *Western Stockyards* v. *New York Central R.R. Co.*, 87 I.C.C. 4, 7 (1923); *Iron City Produce Co.* v. *Pennsylvania R.R. Co.*, 206 I.C.C. 63, 69 (1934).

The Court of Appeals in the case at bar did not grant an immunity from the antitrust laws to railroads, as petitioner asserts (Petition, Point IV, p. 16). Its holding on the railroad's right to engage an exclusive transfer agent followed the settled law that railroads have a right to act as a group to provide joint terminal facilities required or authorized by the Interstate Commerce Act. The right of the railroads as a group to enter into the transfer contract with an agent of their choice is clear.

B.

SINCE THE RAILROADS HAD THE RIGHT TO ENTER INTO THE TRANSFER CONTRACT WITH AN AGENT OF THEIR CHOICE, THE REASONS FOR THEIR SELECTION OF ONE AGENT RATHER THAN ANOTHER ARE IMMATERIAL.

In the *Yellow Cab* case Parmelee and its cab company affiliates were charged with collusive bidding, *i.e.*, an agreement that only Parmelee would offer to perform the transfer service. This Court, after pointing out that "exclusive contracts for the transportation service in question are not illegal," continued (332 U.S. at 229):

> "But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case, and it is a conspiracy of that type that runs afoul of the Sherman Act."

When read superficially and out of context, this language may seem, as it did to the dissenting judge below, to be broad enough to encompass any kind of elimination of competition; but when read in the context of the *Yellow Cab* case, the Court's words clearly refer to the collusive bidding there charged.

Read in its context, this language does not support the proposition that the Sherman Act is violated by a buyer's award of a contract (on which he is under no obligation to accept competing bids at all) to one of two competing sellers for a reason other than the relative merits of their offers.

In the case at bar there is elimination of competition only in the sense that when one exclusive agent was selected, whatever the reason for the selection, the others were necessarily "excluded." This was precisely the effect of the railroads' engaging Parmelee as the exclusive agent for many years prior to 1955. Yet the exclusive arrangement having this inevitable effect was found lawful in the *Yellow Cab* case itself. Competition would have been eliminated to the same extent if Parmelee's, instead of Keeshin's, bid for the exclusive contract had been successful. The only difference would be that Keeshin's competition would have been eliminated.

The effect of the exclusive transfer contract in eliminating competition was exactly the same whether the inducements and motives for entering into it with Keeshin instead of Parmelee were proper, or, as Parmelee charges and as we assume for present purposes, improper. Yet Parmelee's charge, when analyzed, is simply that these inducements and motives were improper for reasons extraneous to the Sherman Act.

Since this is Parmelee's charge, this is what it means when it speaks of "a conspiracy between six railroads

having terminal stations in Chicago, a member of the Interstate Commerce Commission and a seller-competitor of petitioner to suppress competition for the rendering of transfer services on behalf of all twenty-one terminal railroads in Chicago and to monopolize a constituent part of interstate commerce." (Petition, p. 2 and *passim*). Petitioner's semantic device of describing the ultimate facts in the language of the antitrust laws does not answer, it begs, the question of whether they constitute an antitrust violation.

Plaintiff's legal position, stripped of antitrust jargon, is that if one of two or more bidders for a lawful contract in interstate commerce exerts influence on the buyer apart from urging the merits of his bid, and if the buyer yields to that influence, then everyone involved has violated the Sherman Act. This is, in effect, to contend that the Sherman Act requires award of all such contracts to the lowest responsible bidder. However, when Congress intends this in an antitrust statute, it says so specifically, as it did in Section 10 of the Clayton Act (15 U.S.C. §20) which requires competitive bidding in certain cases. There is no authority which remotely supports petitioner's contention.

The legal issue would be precisely the same if there were no claim that Cross participated, and if, instead, it were contended that Keeshin obtained the contract by directly offering the railroads some improper inducement. The successful bidder's use of the instrumentality of a third party to induce the buyer to award him the contract adds no material element. Plaintiff is complaining of the

nature of the inducement allegedly used by the successful bidder and the alleged motives of the buyer in making the selection.

Applicability of the Sherman Act is Not Determined by Reference to Unrelated Laws and Ethical Standards.

The Sherman Act is aimed at restraints of trade. Its applicability is determined by standards found in the Act and the decisions interpreting it, not in other laws extraneous to the Act or its purposes. Conduct which is not covered by the Sherman Act is not brought within the Act's scope merely because it is accompanied by conduct which is unlawful or improper for reasons unrelated to the Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

In the *Noerr* case, this Court held that group solicitation by certain railroads of legislation and law enforcement injurious to their competitors in the trucking industry did not violate the Sherman Act.[14] The courts below had held, *inter alia*, that nevertheless the Sherman Act was violated because of the defendants' use of the so-called third-party technique, which consisted, in this Court's words, of giving "propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." While agreeing that

[14] It is to be noted that the opinion of the trial court in the *Noerr* case (113 F. Supp. 737 (E.D. Pa. 1953)), whose judgment this Court reversed, was heavily relied upon by District Judge Sullivan (144 F. Supp. 480, 484, 485) in overruling the motions to dismiss in the instant case, in the opinion from which petitioner quotes. (Petition, p. 6).

this third-party technique was unethical, this Court said it did not follow that the Sherman Act was violated by activities of this nature "simply because those activities have a commercial impact and involve conduct that can be termed unethical." (365 U.S. at 141.) The Court held: " . . . that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." (365 U.S. at 145.)

The Court further held that even if the sole purpose of the railroads in seeking the passage and enforcement of laws "was to destroy the truckers as competitors for the long distance freight business," this could not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. at 139.) Nor, held the Court, was such a transformation affected by the fact that, as the trial court had found, "the purpose of the railroads was 'more than merely an attempt to pass legislation. It was the purpose and intent . . . to hurt the truckers in every way possible, even though they secured no legislation.'" Observing that this meant that the campaign inevitably caused injury to some truckers and the railroads were hopeful this would happen, the Court said, "To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns." (365 U.S. at 143.)

In the *Apex* case (310 U.S. 469), which is cited with approval in the *Noerr* opinion (365 U.S. at 136), it was contended that the defendants had violated the Sherman Act by conspiring to stop the operation of the plaintiff's factory by a sit-down strike. This Court, while recognizing that the strike restrained the movement of goods in interstate commerce, held that nevertheless this was not the kind of restraint of commerce which the Sherman Act was designed to prohibit. In the *Apex* case, as here, it

was contended that the presence of conduct (there violence) which was unlawful under some other law brought the Sherman Act into play. The Court rejected this contention, saying:

> "The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." (310 U.S. at 513.)

The *Noerr* and *Apex* cases, and other cases as well,[15] recognize that the Sherman Act does not apply to every wrong or crime that affects interstate commerce. Trespass, the forcible seizure of property, homicide, other acts of violence, and bribery are concededly unlawful; but they are not in and of themselves a basis for antitrust liability, even if the acts are done in concert and are intended to and do have commercial consequences.

In following the *Noerr* and *Apex* decisions, the Court of Appeals did not hold, as petitioner asserts, "that because respondent Cross violated some other law, neither he nor his fellow conspirators can be sued under the provisions of the Sherman Act." (Petition, Point III, p. 15.) It

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[15] In accord with the *Noerr* and *Apex* cases in holding that conduct which is not otherwise within the Sherman Act is not violative of the Act because it is attended by violence or conduct improper under some other law or ethical code, are *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 894 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 828 (D. Md. 1937); *Hohensee* v. *Akron Beacon Journal Publishing Co.*, 171 F. Supp. 90, 92, 174 F. Supp. 450 (N.D. Ohio 1959), affirmed, 277 F. 2d 359 (6th Cir. 1960); see also *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945).

held, as did this Court in the *Noerr* and *Apex* cases, that conduct which was not otherwise within the Sherman Act was not brought within that Act because it violated some other law or ethical standard extraneous to the Sherman Act.

The Opinion Below Does Not Hold Buyers or Third Parties Immune from the Sherman Act (Petition, Point III, p. 15)

The opinion of the Court of Appeals does not hold, as petitioner erroneously states, that a conspiracy of buyers, as opposed to sellers, has any immunity from the Sherman Act, or that a conspiracy between buyers and third parties has such immunity. (See Petition, p. 10.) It simply holds, correctly, that the conduct charged here (*viz.*, causing the award of a contract to one contractor rather than his competitor by an improper inducement extraneous to the antitrust laws) is not within the Sherman Act. That it may violate some other law, and so constitute a conspiracy for that purpose, "can be of no consequence so far as the Sherman Act is concerned." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. 127, 145 (1961).

II.

THE DECISION BELOW WAS IN ACCORDANCE WITH PROPER JUDICIAL PROCEDURE. THE QUESTION OF WHETHER THE CONDUCT PLAINTIFF CHARGES CONSTITUTED A VIOLATION OF THE SHERMAN ACT WAS PROPERLY PRESENTED FOR DETERMINATION AND REVIEW. (Petition, Point II, pp. 12-14.)

The decision below was not a departure from the accepted and usual course of judicial proceedings. It was the duty of the Court of Appeals to sustain the judgment on any ground which found support in the record. *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957). Both the majority and the minority in the Court of Appeals recognized that the question of the applicability of the Sherman Act was properly before the Court. That question was presented by the pleadings, and it was also presented by the offers of proof made for the stated purpose of proving an anti-trust violation.

THE PLEADINGS

Under the Federal Rules, a complaint which alleges, even in the form of conclusions, "every element necessary to recovery" will not be dismissed as insufficient. *United States* v. *Employing Plasterers*, 347 U.S. 186, 189 (1954). However, when the plaintiff has elected to plead in detail the facts upon which he bases his claim for relief, the court can and should determine whether they are legally sufficient. *Hoshman* v. *Esso Standard Oil Co.*, 263 F. 2d 499, 502 (5th Cir. 1959), cert. denied, 361 U.S. 818 (1959); see also *St. Louis, K. & S. R.R. Co.* v. *United States*, 267 U.S. 346, 350 (1925); *Liggett* v. *Montgomery Ward & Co.*, 178 F. 2d 436, 439 (10th Cir. 1949). If this were not so, there could never be a judgment on the pleadings or summary judgment based on a motion without supporting affidavits. (See Rules 12(c) and 56 of the Federal Rules of Civil Procedure.)

Here the ultimate facts petitioner claims constitute a violation of the antitrust laws are pleaded in detail in the complaint. (A. 4-11.) The addition of the conclusion that defendants conspired to restrain trade and monopolize, does not change the facts alleged, even assuming that these conclusions would have been sufficient, in the absence of a complete detailing of the facts, to withstand a motion directed at the complaint. The courts below properly determined from the facts alleged in the complaint that plaintiff is charging, not a violation of the Sherman Act, but a violation of other and unrelated laws and moral principles.

THE OFFERS OF PROOF

Petitioner's offers of proof, together with the evidence received, are a second and independent basis for the entry of judgment. Contrary to petitioner's repeated erroneous assertions otherwise (Petition, pp. 8, 12-13), these offers were made for the stated purpose of establishing the violation of the antitrust laws alleged in the complaint. Petitioner's position, as stated to the trial court, was that if the offers established a violation of the antitrust laws, then proof of public injury was unnecessary (A. 445-46, 589), and, further, that it had to prove a violation in order to establish a basis for review (A. 389).

Thus, in contrast to the position petitioner now advances (Petition, pp. 8, 12-13), petitioner's counsel said at the trial that petitioner's offer of proof "hasn't anything to do with the issue" of public injury as defined by the trial court (A. 593), and that the offer was being made because ". . . I don't want the upper court saying, when we get up there, ' . . . You are talking about an academic issue, because you never offered any proof of conspiracy. . . . You have nothing in the record here upon which you can go up.' " (A. 589, 594.) Petitioner's counsel expressly stated in making

their offers of proof that their sole purpose was to establish the violation of the Sherman Act alleged in the complaint. (A. 443, 512, 589, 594.) They even offered evidence on the damages plaintiff had allegedly suffered, because, as they said, "in our opinion, in order to establish a breach of the antitrust laws, it is necessary for the plaintiff to show that they had some injury." (A. 1092.)

No inferences adverse to petitioner were drawn by the courts below. On the contrary, those courts reached their decisions, in the words of the judgment order, " . . . viewing such evidence and offers of proof in the light most favorable to plaintiff, and making all reasonable inferences therefrom in favor of plaintiff." (A. 1755; see also Appendix to Petition, pp. 4a, 19a.) Thus *Sarkes Tarzian, Inc.* v. *United States*, 240 F. 2d 467, 470 (7th Cir. 1957) (Petition, p. 14) has no application.

The statement of the assumed facts in the opinion of the Court of Appeals (Appendix to Petition, pp. 7a-16a) was taken, as the court stated, from the brief of petitioner's counsel in that court. This statement in turn is based upon the uninhibited narrative offers of proof made by petitioner's counsel at the trial. It is inconceivable that the evidence or the ultimate facts could be stated in a light more favorable to petitioner than they were in this statement of its counsel, which was necessarily designed to present the strongest possible showing to the Court of Appeals. That court accepted counsel's statement at its face value.

Petitioner does not say it has additional evidence not referred to in its offers of proof. But whether it has is immaterial. The courts below did not weigh conflicting evidence. They assumed that the offers of proof established the ultimate facts claimed by petitioner. There

were no issues of fact for a jury to decide. The question was simply whether those ultimate facts, assuming they did occur, constituted a violation of the Sherman Act.

The action of the Court of Appeals in determining the applicability of the Sherman Act was proper. There are no procedural questions in the case which call for the exercise of this Court's supervisory jurisdiction.

CONCLUSION

The decision of the Court of Appeals correctly applies the principles laid down in this Court's decisions to the narrow question involved in this case. The court followed proper judicial procedure. No question of importance or of general applicability is presented. Further review is not merited.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act, § 1(4), 49 U.S.C. § 1(4):

Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Interstate Commerce Act, § 3(4), 49 U.S.C. § 3(4):

Interchange of traffic. All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between

connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

Interstate Commerce Act, § 202 (c)(2), 49 U.S.C. § 302 (c)(2):

Application of provisions.

. . .

(c) Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter [Chapter 8 of the Act, regulating motor carriers], except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

. . .

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.